

DOCKET FILE COPY ORIGINAL
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

RECEIVED

MAY - 5 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of 47 C.F.R. § 1.1200)

et seq. Concerning Ex Parte)

Presentations in Commission)

Proceedings)

GC Docket No. 95-21

To: The Commission

PETITION FOR RECONSIDERATION

Lukas, McGowan, Nace & Gutierrez ("LMNG" or the "Firm"), in accordance with Section 1.429¹ of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully requests reconsideration of one aspect of the Commission's March 13, 1997, Report and Order in the above-identified proceeding.² LMNG urges the FCC to reconsider its decision to treat all informal complaint proceedings as "exempt". Alternatively, the firm requests that the Commission take this opportunity to refine its rules to make clear that the informal complaint procedure is only available to a common carrier's customers and only for purposes of raising issues relating to that carrier's alleged violations of its obligations to that customer. In support thereof the following is respectfully shown:

I. INTRODUCTION

1. As an initial matter, LMNG notes that it is not seeking reconsideration of the Commission's decision in this proceeding to simplify the method for determining which proceedings are "restricted" under the ex parte rules and thereby subject to the prohibition on

¹ 47 C.F.R. § 1.429.

² 47 C.F.R. § 1.429; Report and Order, GC Docket No. 95-21, 12 FCC Rcd ____ (rel. Mar. 19, 1997) ("R&O" or "Order").

No. of Copies rec'd 027
List A B C D E

ex parte presentations. The Firm applauds the FCC's effort to refine its ex parte rules to make them simpler and clearer thereby enhancing the public's ability to communicate with the Commission in a manner that comports with fundamental fairness.

2. Under the new rules adopted, the key to determining whether ex parte obligations apply in "restricted"³ and "permit-but-disclose"⁴ proceedings is to determine whether a "party" exists as defined by new section 1.202(d).⁵ If a "party" exists,⁶ any presentations to the

³ Ex parte presentations are prohibited in restricted proceedings. Order at ¶16; 47 C.F.R. § 1.1208.

⁴ Ex parte presentations are permissible in permit-but-disclosure proceedings, but generally must be disclosed by placing any written presentations in the record or, if the presentation is oral, by placing in the record a memorandum containing any data or arguments not already reflected by that party's written submissions in the proceeding. Order at ¶ 6; 47 C.F.R. § 1.1206.

⁵ Order at ¶ 14; 47 C.F.R. § 1.202(d).

⁶ Unless otherwise ordered by the Commission, the following persons are parties:

(1) any person who files an application, waiver request, petition, motion, request for a declaratory ruling, or other filing seeking affirmative relief (including a Freedom of Information Act request), and any person (other than an individual viewer or listener filing comments regarding a pending broadcast application) filing a written submission referencing and regarding such pending filing which is served on the filer, or, in the case of an application, any person filing a mutually exclusive application;...

(2) any person who files a complaint which shows that the complainant has served it on the subject of the complaint or which is a formal complaint under 47 U.S.C. § 208 and § 1.721 of this Chapter, and the person who is the subject of such a complaint that shows service or is a formal complaint under 47 U.S.C. § 208 and § 1.721 of this Chapter;

(3) any person who files a petition to revoke a license or other authorization or who files a petition for an order to show cause and the licensee or other entity that is the subject of the petition;

(4) the subject of an order to show cause, hearing designation order, notice of apparent liability, or similar notice or order, or petition for such notice or order;

(5) any other person who has otherwise been given formal party status in a proceeding; and

Commission regarding the proceeding would require service or notice to that party in restricted proceedings, or compliance with permit-but-disclose requirements where applicable. If a proceeding is not contained in the lists of exempt and permit-but-disclose proceedings, then the proceeding is restricted unless and until its status is altered by the Commission or the staff.⁷

3. The Order further specifies that all formal complaint proceedings will be treated as restricted.⁸ In contrast, for informal complaint proceedings,⁹ if the complaint has not been served, neither the complainant nor the target will be deemed a party, and the proceeding will be treated as exempt.¹⁰

4. LMNG fully supports the Commission's premise that ex parte requirements are no longer tied to the designation of a pleading, but to the "party" status. The finding that a person attains party status and becomes entitled to protection from ex parte presentations by other parties upon the filing of a written submission by the other party is sound.

(6) in an informal rulemaking proceeding conducted under section 553 of the Administrative Procedure Act (other than a proceeding for the allotment of a broadcast channel) or a proceeding before a Joint board or before the Commission to consider the recommendation of a Joint Board, members of the general public after the issuance of a notice of proposed rulemaking or other order as provided under § 1.1206(a)(1) or (2)... 47 C.F.R. § 1.202(d)(Notes omitted).

⁷ Order at ¶ 13; 47 C.F.R. § 1.1200(a).

⁸ Order at ¶ 22; 47 U.S.C. § 208; 47 C.F.R. § 1.721.

⁹ 47 C.F.R. § 1.716.

¹⁰ See 47 C.F.R. § 1.202(d)(2). In contrast, if the informal complaint shows that the complainant served it on the subject of the complaint, ex parte presentations will not be permitted. Order at ¶¶ 18, 22.

5. However, LMNG urges the Commission to refine its definition of "party" to treat as parties the complainant and the subject of the complaint regardless of whether the complaint is labeled as "formal" or "informal". The Firm requests that the FCC refine its definition of "informal" complaint under Rule Section 1.716 to make it clear that the procedure is not available to a carrier's competitors.

II. DISCUSSION

6. As the Commission noted in its Notice of Proposed Rulemaking in this proceeding,

[t]he rules regulating ex parte presentations to the Commission represent an important means for preserving the public's confidence in the integrity of the Commission's processes. They are intended to ensure that the Commission's decisions are based on a publicly available record rather than influenced by off-the-record communications between decision-makers and outside persons. This objective is grounded on basic tenets of fair play and due process.¹¹

LMNG submits that the rules adopted by the Commission do not go far enough in implementing this objective.

7. The Communications Act provides that complaints may be filed against common carriers.¹² The Commission rules implement this provision by permitting an aggrieved person to file either an "informal"¹³ or a "formal"¹⁴ complaint. Formal complaints are classified as

¹¹ Notice of Proposed Rulemaking, GC Docket No. 95-21, 10 FCC Rcd 3240, ¶ 2 (1995)("NPRM").

¹² 47 C.F.R. § 208.

¹³ 47 C.F.R. §§ 1.716-1.718.

¹⁴ 47 C.F.R. §§ 1.721-1.735.

restricted proceedings.¹⁵ As such, they are subject to the full panoply of procedural safeguards designed to ensure a fair hearing of the issue to protect the rights of both the complainant and the targeted carrier. By contrast, informal complaints are considered exempt proceedings.¹⁶ As such, the complainant has no service obligations and is free to engage in discussions with the FCC regarding the complaint with no disclosure obligations. Despite their entirely disparate regulatory status, there are no limitations on the allegations that can be raised in informal versus formal complaints.

8. The informal complaint procedure had laudable beginnings. It was designed to provide the simplest and fastest means to obtain a carrier's response and/or resolution of a problem. Indeed, informal complaints typically relied on "correspondence or verbal communications complaining of a carrier's action and d[id] not generally include legal or technical arguments."¹⁷

9. However, because there are no restrictions on either the party filing or the issues raised in an informal complaint, the procedure can be a vehicle for advancing competitive agendas, having nothing to do with the carrier's practices vis-a-vis its customers. Such complaints may include allegations of violations of the most serious nature, allegations which,

¹⁵ For formal complaints filed under 47 U.S.C. § 208 and 47 C.F.R. § 1.721 parties include the complainant and target. Order at ¶ 20; 47 C.F.R. § 1.1202(d)(2). Because formal complaint proceedings are not contained in the list of exempt proceedings under Section 1.1204 or permit-but-disclose proceedings under Section 1.1206, formal complaint proceedings are restricted pursuant to Section 1.1208.

¹⁶ 47 C.F.R. § 1.1204(b)(5).

¹⁷ Amendment of Rules Governing Procedures to be Followed Where Formal Complaints Are Filed Against Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 86-498, 2 FCC Rcd 90, ¶ 2 (1986).

if proven, could justify significant economic or other sanctions. For example, although the Order expressly distinguishes a complaint from a petition to revoke a license, and makes it clear that a petition to revoke must be served on the licensee,¹⁸ a party could label its pleading an informal complaint, and thereby avoid a service obligation, even if the pleading raises issues that could result in the revocation of a license. Thus, a pleading that clearly would be subject to the ex parte rules if filed against any FCC licensee other than a common carrier¹⁹ could be filed without notice to the targeted carrier if it were entitled an informal complaint. The complainant could gain the further advantage of arguing its case in subsequent presentations to the Commission without an opportunity for the targeted carrier to refute the allegations. By the time the FCC notifies the carrier of the complaint, and orders the carrier to respond, the FCC already could have made a determination that the complaint has merit, based on the factual allegations of the complainant only. While the targeted carrier is invited to respond to the complaint after the FCC has reviewed it, and possibly discussed it with the complainant, it is precisely that one-sided assessment that the ex parte rules are intended to preclude. It is only by ensuring that the FCC has the opportunity to consider the positions of both parties, essentially simultaneously, that an impartial process is guaranteed. A service requirement will also serve as a deterrent to frivolous or unsubstantiated complaints that a party might be tempted to submit, knowing it would not be subject to challenge.

10. As Congress and the Commission continue to expand the class of telecommunications providers considered to be common carriers, and thus subject to the

¹⁸ Order at ¶ 23.

¹⁹ See, 47 C.F.R. § 1.202(d)(1).

provisions of Title II,²⁰ the opportunity to take advantage of the informal complaint process to bypass the ex parte rules is similarly expanded. LMNG submits that the remedy is to treat both the complainant and the subject of the complaint as parties for purposes of the ex parte rules, whether or not the complainant has served the complaint on the carrier, and to treat proceedings involving all complaints filed pursuant to Section 208 as "restricted". Alternatively, the Firm requests that the FCC refine its definition of "informal" complaint under Rule Section 1.716 to restrict its use to filings by a carrier's customer which raise issues relating to that carrier's alleged violations of its obligations, as a common carrier, to that customer.

11. The informal complaint procedure allows the FCC to resolve differences between members of the public and FCC licensees informally and quickly. This consumer safeguard provides a common carrier's customers a forum to air grievances about their carrier. It has proven to be a useful and important mechanism for the public to obtain satisfaction.²¹ This procedure should remain the domain of common carrier subscribers; it should not be available as a vehicle for parties to circumvent the Commission's ex parte rules.

²⁰ The Omnibus Budget Reconciliation Act of 1993 reclassified heretofore private systems as Commercial Mobile Radio Systems ("CMRS"). Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, 107 Stat. 312 (1993)("Budget Act"). In addition, The Telecommunications Act of 1996 mandated that CMRS licensees were to be treated as common carriers and thus subject to section 208 regarding formal complaints. 47 U.S.C. § 332(c).


²¹ For example, it has proved useful for customers to obtain relief from unauthorized changes of customer's primary exchange carrier, a practice commonly known as "slamming". See, Report and Order, CC Docket No. 94-129, 10 FCC Rcd 9560 (1995). It has also provided telephone company customers with a forum to air grievances about improper billing practices and improper disconnection. See, In the Matter of the Complaint of Mrs. Martha Transquilli, Mount Bayou, Miss., Against Mississippi Telephone and Communications, Inc., Order, Docket No. 19271, 30 FCC 2d 836 (1971).

III. CONCLUSION

12. A decision based on the merits of a case requires a record compiled openly with equal opportunity for each party to argue his position. Surreptitious efforts to influence an official charged with the duty of deciding a complaint is contrary to concepts of due process, fair play and unbiased decision making.²² To ensure that complaint proceedings involving common carriers are open and fair, LMNG respectfully requests the Commission to reconsider the matter described herein.

Respectfully submitted,

LUKAS MCGOWAN, NACE & GUTIERREZ


By: Elizabeth R. Sachs
Marilyn S. Mense

1111 19th Street, N.W., 12th Floor
Washington, D.C. 20036
(202) 857-3500

Dated: May 5, 1997

²² See, Louisiana Association of Independent Producers v. FERC, 958 F.2d 1101, (D.C. Cir. 1992).

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 5th day of May 1997, caused to be mailed a copy of the foregoing Petition for Reconsideration to the following:

- | | | | |
|---|---|---|---|
| * | Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554 | * | William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W. Room 614
Washington, D.C. 20554 |
| * | Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554 | | Byron F. Marchant, Esq.
Chair-Elect
Federal Communications Bar Assoc.
1722 Eye Street, N.W., Ste. 300
Washington, D.C. 20006-3705 |
| * | Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554 | | International Transcription Services, Inc.
2100 M Street, N.W., Ste. 140
Washington, D.C. 20037 |
| * | Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554 | | |
| * | Dan Phytheon, Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554 | | |
| * | Regina Keeney, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554 | | |



Linda J. Evans

*Via Hand Delivery